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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN ERIC THOMPSON and
RALPH GIACINTI,

Defendants-Appellants.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, SEVENTH CIRCUIT

JOSEPH R. NAPOLI
Attorney-at-Law
1820 Savings Center Tower
Peoria, Illinois 61602
Telephone (309) 676-4844

ARTHUR J. INMAN
Attorney-at-Law
415 First National Bank Bldg.
Peoria, Illinois 61602
Telephone (309) 673-7378

QUESTION PRESENTED FOR REVIEW

Whether there was manifest injustice in the appellant-defendants' (petitioners') entry of guilty pleas in the District Court, by reason of incompetent counsel, so that a withdrawal of guilty plea under Rule 32(d), Federal Rules of Criminal Procedure, should have been permitted.

PARTIES

All parties are identified in the caption.

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Order prior to Oral Argument
Opinion of the Seventh Circuit
Order Denying Rehearing

TABLE OF AUTHORITIES

Blackledge v. Allison, 431 U.S. 63, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977).

U.S. v. Hawthorne, 502 F. 2d 1183 (3rd, 1974).

U.S. v. Shneer, 194 F. 2d 598 (3rd, 1952).

Allison v. Blackledge, 533 F. 2d 894 (4th, 1976).

CITATION

The case below is cited as U.S. v. Thompson, 680 F. 2d 1145 (1982).

STATEMENT OF JURISDICTION

(i) The Seventh Circuit Court of Appeals rendered its opinion and decision on June 10, 1982.

(ii) Rehearing was denied on ~~July~~ AUG 30, 1982.

(iii) This Petition is sought pursuant to 28 U.S.C. 1254(1).

FEDERAL RULE INVOLVED

A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea. Federal Rule of Criminal Procedure, Rule 32(d).

STATEMENT OF THE CASE

Defendants JOHN ERIC THOMPSON and RALPH GIACINTI were indicted for violation of federal statutes prohibiting the conspiracy to manufacture, and the manufacture of a Schedule II controlled substance, methamphetamines, in violation of federal statute.

They were arraigned, entering pleas of not guilty, and they filed motions to suppress and (by Thompson) a motion to dismiss the indictment. These motions were denied. On the day before they were scheduled to go to trial, both Thompson and Giacinti entered their pleas of guilty to Count I of the indictment, the Government dismissing Count II.

Both defendants were sentenced to three years' imprisonment, and their appeal was taken to the Court of Appeals for the Seventh Circuit. Their attorneys on the appeal were, initially, the same two counsel who represented them jointly in the trial court. These attorneys filed a

four-page argument in their Brief, relying solely on the search and seizure issue as a basis for reversal of the sentences and convictions.

New counsel subsequently entered the case on appeal and sought leave to amend the record on appeal and sought an extension of time in which to file an amended brief on appeal. The Seventh Circuit ruled that the motions would be "taken with the case."

The Appellate Court has never ruled explicitly on the motions to amend the record and for extension of time. However, the Court did render an opinion which held that, without a complete record on the issue of alleged incompetent counsel, the Court could not decide the issue. The Court thus held that the record was not established to support appellants' contentions of incompetent counsel, but never ruled, before or after oral argument, on whether appellants would be permitted to amend the record on appeal. It further never ruled on the appellants' request for extension of time to file

amended Briefs, except perhaps sub silentio by rendering a decision and opinion against the appellants. The opinion apparently relied on the insufficiency of the record.

The record, as it existed before the Seventh Circuit, was that complied by the attorneys whom the appellants claimed to be incompetent.

With respect to the allegations of incompetence by trial counsel, who have submitted the only Brief presented by appellants to the Seventh Circuit, the following allegations are made:

1) trial counsel's undisclosed attorney-client relationship to the principal (or only) civilian witness for the government as to Giacinti;

2) as to Thompson, trial counsel's untrue denial that a professional relationship had not obtained within the past five years;

3) trial counsel's assurance to Thompson that such a relationship as existed would not create a conflict of interest;

4) trial counsel's promise and guarantee to defendants that they would receive probation with a maximum of 60 days in jail should they enter pleas of guilty;

5) the absence of any plea agreement or other authority as a basis for the promise of probation with minimal imprisonment;

6) the pursuit of an appeal by the same trial counsel upon a theory, search and seizure, which was in no wise preserved for review in the trial court.

ARGUMENT

There appear to be a substantial number of cases construing the "manifest injustice" requirement under 32(d), FR Crim P 32(d), in relationship to erroneous estimates by defense counsel of the sentence which will be imposed. The instant case presents a somewhat different perspective on Rule 32(d). It appears that the precise issues raised herein have not previously been ruled by this Court, or by the District Courts of Appeals. This is true of the Seventh Circuit Court of Appeals in the instant case, because that Court simply refused to acknowledge these issues.

That Court simply observed in its opinion in the instant case, "To permit consideration by an appellate court of a belated motion to withdraw a plea of guilty, or to otherwise remand the matter back to the district court, would literally destroy the proper administration of justice in handling criminal appeals." 680 F. 2d 1145 at 1149 (1982).

It would appear that such a construction of the statute reads that provision concerning a late effort to withdraw a guilty plea out of existence. Further, the Seventh Circuit appear to ignore the inherent limitations that the "manifest injustice" requirement places on the right of late withdrawal of guilty plea.

The cases are numerous and clear that a mere misguess or misjudgment as to the sentence which the trial court might impose on a plea of guilty is not a "manifest injustice." But that is not the issue in the instant case. Here, it appears that trial counsel were incompetent and, possibly, not even attempting to serve the interests of their clients. Appellants' assertions to the Court of Appeals that one of their attorneys was also an attorney for a government witness, coupled with the attorney's guarantee of a specified sentence, raise a far different issue than mere misjudgment about the sentence.

In United States v. Hawthorne, 502 F. 2d 1183 (3rd, 1974), U.S. cert. den. 429 U.S. 894,

the Court for the Third Circuit explicitly held that if defendant reasonably believed that an explicit agreement had been reached between counsel and prosecutor, then, when the sentence exceeds that promised, withdrawal or other relief will be appropriate. This is so even though great weight must be given to the Rule 11 avowals of the defendant. Contrary to the fears expressed by the Seventh Circuit in the instant case, this approach will not seriously "undermine the finality of Rule 11 proceedings." 502 F. 2d at 1187. Furthermore, the Third Circuit's approach appears to be a long standing policy. See U.S. v. Shneer, 194 F. 2d 598 (1952).

Appellants herein were sentenced to three years' imprisonment. Their counsel guaranteed them they would in no event receive more than 60 days imprisonment as a result of pleading guilty. This promise came from the same counsel who falsely denied professional association with the Government's informant.

The District Court in Hawthorne, after an evidentiary hearing pursuant to the Third Circuit's directions, allowed the withdrawal of guilty plea. U.S. v. Hawthorne, 532 F. 2d 318 (3rd, 1976). See also Allison v. Blackledge, 533 F. 2d 894 (4th, 1976), placing the Fourth Circuit in line with the Third.

This last case appeared in an opinion in this Court sub nom. Blackledge v. Allison, 431 U.S. 63, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977). There this Court noted some matters which do not appear in the instant case, particularly a state court record much less detailed than that found in the instant federal trial court record, and the absence of formalized negotiated plea procedures in that case.

However, this Court's opinion does emphasize that a record in the trial court, while imposing, is not insurmountable. The Fourth Circuit decision was affirmed, and the case was remanded for hearing on the allegations of defendant.

The "manifest injustice" standard should provide ample protection from the administrative problems feared by the Seventh Circuit.

CONCLUSION

Petitioners (defendant-appellants below) pray that this Court allow their petition for writ of certiorari on the issue herein raised.

Respectfully submitted,

JOHN ERIC THOMPSON
RALPH GIACINTI

Petitioners

by:_____
JOSEPH R. NAPOLI
Their Attorney

JOSEPH R. NAPOLI
Attorney-at-Law
1820 Savings Center Tower
Peoria, Illinois 61602
Telephone (309) 676-4844

ARTHUR J. INMAN
Attorney-at-Law
415 First National Bank Bldg.
Peoria, Illinois 61602
Telephone (309) 673-7378

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 6, 1981

Before
Hon. LUTHER M. SWYGERT, Circuit Judge

UNITED STATES OF AMERICA	) Appeal from the United States District Court for the Central District of Illinois, Peoria Division
Plaintiff-Appellee,	)
No. 80-2568 vs.	)
JOHN ERIC THOMPSON and RALPH GIACINTI,	) No. Cr. 80-10021 Judge Robert D. Morgan
Defendants-Appellants.	)

This matter comes before the Court for its consideration on the filing herein of the following documents:

1) The "MOTION FOR LEAVE TO AMEND THE RECORD ON APPEAL" filed herein on March 16, 1981, by counsel for the defendant-appellants,

2) The "MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE APPELLANT'S AMENDED BRIEF ON APPEAL" filed on March 16, 1981, by counsel for the defendants-appellants,

3) The "NOTICE TO RESPOND" issued by the Court on March 19, 1981, to plaintiff-appellee.

On consideration thereof, it is ordered that the above-named motions will be taken with the case. Counsel may address these motions at the time of oral argument which will proceed as scheduled on Thursday, April 9, 1981, at 9:30 a.m.